Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)))))))	MM Docket No. 92-266

REPLY OF THE NYNEX TELEPHONE COMPANIES

The NYNEX Telephone Companies[1] hereby reply to Oppositions to their Petition for Reconsideration urging the Commission to reconsider its decision to include low penetration systems in its cable rate benchmark.

The NTCs have demonstrated that the Commission, contrary to its conclusion in the Order,[2] has discretion to exclude the rates of low penetration systems from its cable rate benchmark. The cable companies opposing the NTCs' Petition do not really dispute this. Instead, they argue that

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1 The NYNEX Telephone Companies are New England Telephone and Telegraph Company and New York Telephone Company.

2 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, FCC 93-428, August 27, 1993 ¶¶ 124-131.

the Commission may not redefine "effective competition."[3] These companies miss the point. The Commission does not have to redefine a statutory term to exclude low penetration systems from its benchmark.

The Commission itself has found that it has substantial discretion to achieve reasonable cable rates. For basic cable rates, the Commission stated that it would balance not only all seven factors the Act requires it to "take into account,"[4] but also the Act's "statutory goals."[5] For cable programming rates, the Commission found that it could consider factors aside from those enumerated in the Act.[6]

It is indisputable that one of Congress' overriding "statutory goals" was to ensure reasonable cable rates.[7]

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3 Time Warner Opp. p.2; Continental Cablevision Opp. pp. 1-2; Cablevision industries opp. pp. 2-3; Viacom Opp. pp. 2-4.

4 1992 Cable Act, § 623 (b)(2)(C).

5 See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Notice of Proposed Rulemaking, 8 FCC Rcd. 510 (1992) para. 31 ("The statute does not explicitly define 'reasonable,' instead requiring the Commission to establish regulations designed to achieve the goals set forth in the statute and reflective of the enumerated factors. We tentatively conclude that Congress intended the Commission to embody in these regulations a standard of resonableness for basic tier rates that regulates a reasoned balancing of these statutory goals and factors."); Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993) ¶ 177.

6 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993) ¶ 382.

7 1992 Cable Act Sections 623(b)(1); 623(c).

Congress was very concerned that cable rates were too high.[8] And, it is well established that the rates of low penetration systems are substantially higher than the norm.[9] Whether the reason is market power,[10] or some other reason,[11] the Commission has the power to give the rates of these systems very low weight in fashioning its benchmark. Simply put, the Commission could find these systems to be anomalies that should not be included in fashioning a rate benchmark for the industry.[12] Having "take[n] into account" the

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8 See 1992 Cable Act Section 2(a)(1); House Report pp. 32-33.

9 Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993) ¶ 560 and App. E ¶ 30.

10 Contrary to what some cable companies (Cablevision Industries Opp. p. 5; Continental Cablevision Opp. pp. 2-3; NCTA Opp. p. 5; Viacom Opp. pp. 4-5) simplistically argue, 30% penetration does not equal a low market share. See Affidavit of Thomas W. Hazlett, Joint Comments of Bell Atlantic, GTE, and the NYNEX Telephone Companies in Response to Further Notice of Proposed Rulemaking, June 17, 1993. (Contrary to Time Warner's assertion (Time Warner Opp. n.2), none of the joint commenters has withdrawn its position taken in those Joint Comments.)

11 NCTA states that the high rates of low penetration systems could result from higher than average costs. NCTA Opp. p. 5. Costs are also among the statutory factors the Commission must take into account under the 1992 Cable Act (§§ 623(b)2(c) and 623(c)(2)).

12 For example, if, as NCTA asserts, the high rates of low penetration systems result from higher than average costs (NCTA Opp. p. 5), the Commission could "take into account" this fact under the "cost" factors enumerated in the Act (§§ 623(b)2(c) and 623(c)(2)). Since low penetration systems are exempt from regulation, and since, in any event, systems with higher than average costs can use cost-of-service rather than the benchmark to calculate their rates, the Commission could conclude that these systems with higher than average costs should not be included in the benchmark that will apply to the industry in general.

characteristics of these systems, the Commission can exclude their rates in the interests of achieving a "reasonable" cable rate benchmark.

The Commission can and should exclude the low penetration systems' rates from its benchmark. Contrary to what the cable companies would have the Commission believe, excluding the low penetration systems' rates from the benchmark would not be "draconian."[13] Low penetration systems themselves, which one would expect to be affected the most, are exempt from rate regulation. And, if the revised benchmark truly worked a hardship on any other cable company, that company would have the option of using cost-of-service measurements to ensure that its costs are recovered. The Commission can well afford to trim the fat on its cable benchmark so as to bring it in line with Congress' goal of "reasonable" cable rates. Indeed, failing to do so disserves the consumers Congress sought to protect.

There is substantial support for the conclusion that the Commission's cable rate regulations have not carried out Congress' intent. The State of Connecticut, filing in support of the NTCs' Petition, has found that "the overall cost of basic and cable programming services increased for the majority of Connecticut's cable television subscribers" after the Commission's regulations took effect.[14] The Commission's

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13 E.g., Viacom Opp. n.6.

14 Statement of the State of Connecticut in Support of Petition for Reconsideration, October 18, 1993 p. 2. The State of New York and GTE also filed in support of the NTCs' Petition.

preliminary results of its cable rate survey show that approximately one-third of consumers have seen rate increases under the new regulations.[15] And, it is worth noting that the country's largest MSO[16] has expressed its intent to raise its rates and "blame it on regulation and the government."[17]

Congress is very concerned that its "intent to protect consumers from unjustified cable rate increases is not being met."[18] According to a recent letter to Chairman Reed Hundt from thirty-five U.S. Senators:

> • Based upon the concerns expressed by our constituents and the Federal Communications Commission's (FCC's) own research, it appears that the intent of Congress to protect consumers from unjustified cable rate increases is not being met. It is our view that the Commission must take additional action to reduce cable rates . . .[19]
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> • Congress enacted the 1992 Cable Act largely due to excessive cable rates and poor quality service. A variety of reports indicated that cable rates rose three times faster than the rate of inflation since rates were deregulated in 1986. The issue of excessive cable rates was particularly important to our constituents.[20]

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15 FCC Announces Preliminary Results of Cable Rate Survey, Report No. DC-2516, October 21, 1993.

16 TCI serves over 12.5 million households across the country.

17 Separate Statement of James H. Quello, Letters of Inquiry - Cable Rates, November 17, 1993, quoting TCI memorandum.

18 Letter to the Hon. Reed Hundt from 35 U.S. Senators, November 29, 1993. See also Letters to Hon. James H. Quello from Rep. Edward J. Markey, October 26, 1993 and November 17, 1993.

19 Letter to the Hon. Reed Hundt from 35 U.S. Senators, November 29, 1993 p. 1.

20 Id.

- Despite the FCC's best efforts, it appears that consumers are not benefiting from the legislation as much as Congress intended. We continue to receive complaints from our constituents indicating their displeasure with the new charges for their cable service. Several newspapers and trade journals have published stories indicating that, although rate changes vary from customer to customer and region to region, many customers are paying more for cable service since the FCC's rate rules took effect. In short, while rates for some consumers have declined, rates for too many consumers have risen.[21]

- The FCC's own recent rate survey provides further evidence that the goals of Congress have not been adequately addressed. According to the FCC's interim analysis, while approximately two-thirds of consumers have seen rate decreases, about one-third of consumers have seen rate increases. This result is unacceptable. If this survey accurately reflects the situation across the country, the FCC's rules will not have achieved the result intended by Congress.[22]

- Congress did not intend that consumers would be charged more for their cable service because of the FCC's rules. In fact, evidence was submitted to the Committee during its consideration of the cable bill that regulation of cable rates would result in rate decreases totalling several billion dollars. As now enforced, it appears that the actual effect of the FCC's rules will fall far short not only of these estimates, but also the Commission's own estimates at the time the rate rules were adopted. We urge the Commission to review its rules on reconsideration in a way that will provide additional consumer protection and will more fully reflect the intent of Congress in passing the legislation.[23]

Cable rates are still too high. Excluding low penetration systems from the rates will lower the Commission's benchmark, and, the NTCs submit, will go far to eliminate the

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21 Id.

22 Id. at p. 2.

23 Id.

windfall profits cable companies would otherwise reap under the new regime.[24] The Commission can, and clearly should, reconsider its decision and exclude low penetration system rates from its cable rate benchmark.

Respectfully submitted,

NYNEX Telephone Companies

By: Shelley E. Harms
Mary McDermott
Shelley E. Harms

120 Bloomingdale Road
White Plains, NY 10605
914/644-2764

Their Attorneys

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24 If this result is "draconian," as some of the opposing cable companies suggest, they have the option of using cost of service measurements to justify rates higher than the benchmark.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing REPLY OF THE NYNEX TELEPHONE COMPANIES were served on each of the parties listed on the attached Service List, this 9th day of December, 1993, by first class United States mail, postage prepaid.

Elaine Fennessy

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